No. 90-872

IN THE

# Supreme Court of the United States

October Term 1990

YELLOW BUS LINES, INC.

*Petitioner,*

v.

DRIVERS, CHAUFFEURS & HELPERS
Local Union 639, *et al.*

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## PETITIONER'S REPLY BRIEF

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## I. Respondents' statement of the case misleads this Court by stating the facts in the light most favorable to the Respondents even though the jury found against Respondents.

In an effort to mislead this Court into believing that this Petition is not worthy of review, Respondents set out the evidence in the light most favorable to Respondents. In fact, the jury found for Petitioner with respect to threats and

malicious destruction of property, the issues which would be relevant in an action brought pursuant to the Racketeer-Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961, et seq. Neither the District nor the Circuit Court set aside the jury's verdict on these issues. A brief, but more full statement of the facts may assist this Court in assessing this Petition's merit.

The original Complaint alleged, in addition to the threats and acts of violence against Yellow Bus, numerous threats and acts of violence against Yellow Bus employees and numerous threats of violence directed against two other companies, A.E. Prinkey & Sons and Howat Concrete Co., comprised in part of three separate threats to kill four different people, the first on August 26, 1981, and the last on June 8, 1982. Construing the threat to cut the brake lines on Yellow Bus

buses in November 1981, which was proven at trial, as a threat to kill the persons on the bus, and including a threat to kill a replacement driver at Yellow Bus during the strike, a pattern of threats to kill has already been alleged or proven, or both, which extends from August, 1981 through June, 1982, involving three companies, five different threats to kill, and five named victims, plus whoever might be on the bus. Proof at trial also showed specific incidents of malicious destruction of Yellow Bus' buses from the time of the strike in November, 1981, until at least May, 1982. Yellow Bus can show a similar but much greater pattern of malicious destruction of property against Howat Concrete Co. in 1982.

What happened at Yellow Bus, A. E. Prinkey & Sons, and Howat Concrete Co. in 1981 through 1982 was not, in short, an accident or a minor matter. What happened

reflected policy, a policy to use a pattern of racketeering acts to achieve union objectives, which was adopted by an important local union with important consequences for the entire metropolitan Washington area--and, legally, the nation. Petitioner was grievously injured. This Court ought to reject any effort to minimize the significance of this Petition.

II. The person enterprise rule reflects a split in the circuits worthy of review precisely because the majority view is wrong.

Respondents, as does Petitioner, recognize that the circuits are split on the person enterprise rule. Basically, Respondents suggest that the District of Columbia Circuit's view is correct because it adopted the majority view. But the majority view ought not be the majority view if it is wrong. The reasons why it is wrong are ably stated in the A.B.A. report

cited by Petitioner. (Petitioner's Brief p.13.) Nor does the superficial reasons offered by Respondents to justify the rule convince or respond to the better reasoned minority view. This Court sits precisely to resolve these sorts of splits in the authorities correctly, based on reason, not by counting.

III. Respondents' efforts to defeat review of the decision of the Circuit Court by pointing to another decision that they characterize as consistent does not defeat the existence of the conflict acknowledged by the Circuit itself.

Respondents' suggestion that the decision of the District of Columbia Circuit is consistent with Overnite Transportation Co. v. Local 705, 904 F.2d 391, 394 (7th Cir. 1990) is not only wrong, but irrelevant. The District of Columbia Circuit adopted a per se management only rule; the Seventh Circuit specifically

rejects such a rule. Schacht v. Brown, 711 F.2d 1343, 1360 (7th Cir 1983) (not limited to "manager") ("We do not believe the language and purpose of §1962(c) support such an interpretation."), cert. denied, 464 U.S. 1002 (1983). Overnite merely holds that the plaintiff had not plead sufficient facts to establish "participation," not that strike related offenses constituting violence could not be "participation." Id. at 394 n.4 (Yellow Bus specifically distinguished). Nor do Respondents deal with the important policy implications of the management only rule outside of the context of union sponsored violence: to the thrift and similar financial crises. (See Petitioner's Brief pp. 24-26.) Respondents, in short, concede by their silence the force of Petitioner's arguments here. Obviously, review is merited.

IV. Respondents' effort to defeat review

by suggesting that Petitioner is not harmed by the other entities act rule ignores the impact of the rule on Petitioner's burden to show the existence of a pattern to a jury.

Respondents' suggestion that the rule adopted by the District of Columbia Circuit that Petitioner is precluded from including in its "pattern" acts directed toward other entities is outside of this Court's Article III power of review is disingenuous. Petitioner cannot, of course, collect damages for acts injurious to others, but in showing that the Respondents' conduct is worthy of RICO treble damages, Congress imposed on Petitioner the duty of showing a "pattern" of conduct. Limiting Petitioner to showing only conduct aimed at itself deprives Petitioner of the right to make its showing not only adequate, but persuasive. Petitioner must show Respondents' conduct was not isolated, but

represented a course of conduct. Showing that Petitioner was not the only victim goes to the heart of RICO's statutory scheme, that is, the showing of a "pattern," as in the instance of civil rights claims where a similar "custom or policy" must be shown. See, e.g., Oklahoma City v. Tuttle, 471 U.S. 808, 814 (1985). The District of Columbia Circuit's rule is inconsistent with the better reasoned opinions of other circuits, and it threatens to make what Congress wrote as part of the elements of the offense that are a mandatory part of the plaintiff's case into a question of a discretionary showing as a matter of evidence of unrelated conduct. (Obviously, too, the Circuit Court's narrow rule affects the running of the statute of limitations. See, e.g., Havens Realty Corp. v. Coleman 455 U.S. 363, 380-81 (1982) (discrimination in housing) (if one act part of a

continuing offense, even if directed toward another, within the period, all acts are within the period)). It borders on nonsense, therefore, to suggest that Petitioner was not harmed by the adoption of the Circuit Court's narrow rule.

V. Respondents' effort to minimize Petitioner's fourth question for review on the application of the liberal construction directive shows the need for the Writ.

Petitioner presented four questions for review. Respondents restate the issues so that only three are presented. In fact, Petitioner's central point that the District of Columbia Circuit misapprehended the effect of the liberal construction directive is relegated to a footnote. (Respondents' Brief p. 21 n.9.). Respondents' similar misunderstanding of the character of the plain meaning rule and the rule of lenity, therefore, well indicates the need for this Court to

provide authoritative guidance in this area, as it did in Moskal v. United States, 111 Sup. Ct. 461, 464-65 (1990). Just as the Petitioner in Moskal misunderstood the relation between the plain meaning rule and the principle of lenity, so also do Respondents misunderstand the relation between liberal construction, lenity, and vagueness. Lenity is one rule to resolve ambiguities; it is not suppose to give rise to them. Liberal construction is an alternative rule to resolve ambiguities. Neither rule touches directly on the constitutional rule that deals with vagueness. Vagueness is not a question of ambiguity, that is, multiple meanings, but of indefinite meaning, that is, no meaning at all. The need for authoritative guidance in this area is, therefore, manifest.

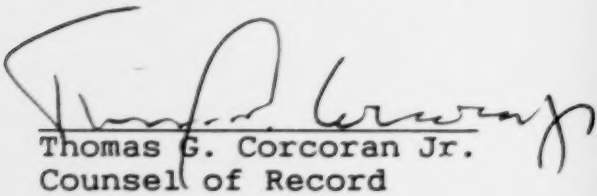
## CONCLUSION

For these reasons, a Writ of Certiorari should be issued to the Court of Appeals for the District of Columbia.

Dated: January 15,1991

Respectfully submitted,

YELLOW BUS LINES, INC.

By: 

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